In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1237

M. LOIS CORSON, ET AL., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Harry J. Alker, Jr.,[1] an attorney with a considerable estate and tax practice, was convicted of willful evasion of taxes for the years 1947 through 1950.

[1] Harry J. Alker, Jr., is the principal taxpayer and shall for convenience be referred to hereinafter as "petitioner." M. Lois Corson and Marion Alker are his sisters. The courts below upheld substantially all of the Commissioner's adjustments in the sisters' incomes for the years 1948 and 1950 based on unreported dividend and rental income and disallowance of unsubstantiated deductions.

His conviction was affirmed on appeal and this Court denied review. *United States* v. *Alker*, 260 F. 2d 135 (C.A. 3), certiorari denied, 359 U.S. 906. Thereafter, the Commissioner determined deficiencies in income tax due for the years 1946 through 1950 and assessed civil fraud penalties for each of the years in question. The parties stipulated that the record in the criminal trial would constitute evidence in the civil trial. The Commissioner also determined that certain income and deductions claimed by petitioner's sisters were in fact allocable to petitioner and determined deficiencies in income taxes due against the sisters for the years 1948 and 1950.

The Tax Court found, on the basis of the entire record before it (1) that the Commissioner's deficiency determinations against petitioner and his sisters for the years 1946-1950 were correct, (2) that petitioner had been guilty of fraud in 1947-1950 and thus that the fraud penalty was applicable for those years, and (3) that petitioner had failed to file a return for the year 1946 and thus that the delinquency penalty applied for that year. On review, the Third Circuit affirmed the Tax Court's findings on the ground that they were supported by sufficient evidence in the record.

This case presents solely factual questions which have been resolved against petitioner by the Tax Court and the court of appeals. The concurrent findings by the courts below that the petitioner fraudulently failed to report income in the years in question is amply supported by the evidence and does not

warrant further review here. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214; *Rudolph* v. *United States*, 370 U.S. 269, 271.[2]

Petitioner also addresses himself at length to the issue of collateral estoppel, arguing that his criminal conviction does not preclude him from denying fraud in the instant civil proceeding. However, neither the Tax Court nor the court of appeals invoked the doctrine of collateral estoppel in the instant case. The lower courts based their decisions on the evidence in the record, including the evidence adduced at the criminal trial which, by stipulation of the parties, was made a part of the record in this case (See Pet. 83).

The Commissioner is not bound, as petitioner contends (Pet. 29, 31-32), by the figures asserted as deficiencies in the criminal case. Since a determination of the exact amount of a deficiency is not essential to a conviction of willful evasion,[3] there has been no liti-

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[2] Petitioner's principal complaints are that the Commissioner and the courts overvalued certain stock received by him as compensation for legal services performed and failed to find that he was required to pay a portion of certain other fees which he received over to others. These factual issues have been resolved below and present no question of general importance.

[3] *United States* v. *Johnson*, 319 U.S. 503, 517; *Katz* v. *United States*, 321 F. 2d 7, 11 (C.A. 1), certiorari denied, 375 U.S. 903; *Gendelman* v. *United States*, 191 F. 2d 993, 996 (C.A. 9), certiorari denied, 342 U.S. 909; *United States* v. *Schenck*, 126 F. 2d 702, 704 (C.A. 2), certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U.S. 705; *Tinkoff* v. *United States*, 86 F. 2d 868, 878 (C.A. 7), certiorari denied, 301 U.S. 689.

gation of a question of fact essential to judgment, and collateral estoppel cannot apply. *Commissioner* v. *Sunnen*, 333 U.S. 591, 601.

Nor has petitioner been deprived of any constitutional rights under the Fifth and Sixth Amendments (Pet. 28-29). Himself a lawyer, he was represented by counsel throughout the proceedings and retained an accountant to summarize his books and records for trial (Pet. 36-46).

The decision below was correct and there are no questions of general importance warranting further review. The petition should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JOSEPH M. HOWARD,
DEENE R. GOODLAW,
Attorneys.

MAY, 1967.

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